No. 88-1377

In the Supreme Court of the United States

OCTOBER TERM, 1989

LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

BRIAN ZEBLEY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL BRIEF FOR THE PETITIONER

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Pursuant to Rule 35.5 of the Rules of this Court, the Solicitor General, on behalf of the Secretary of Health and Human Services, respectfully files this supplemental brief to inform the Court of recent legislative and administrative developments that have a bearing on the issues in this case.

1. *Legislative Developments.* We informed the Court in our reply brief (at 18-19) that Congress was considering several provisions affecting the children's disability program as part of the omnibus reconciliation bill for fiscal year 1990. We wish to inform the Court that those provisions have been deleted from the bill, which passed the House of Representatives and the Senate early in the morning of November 22, 1989.

The House of Representatives passed a version of the budget reconciliation bill on October 5, 1989, that would have affected the SSI children's disability program in

several respects. Gov't Reply Br. 18-19 & n.13. Of particular relevance here, that bill would have amended Title XVI, effective October 1, 1989, expressly to require an "individualized assessment" of a child's impairments that "prevent or significantly interfere with the activities of daily living appropriate to the age of the child." H.R. 3299, 101st Cong., 1st Sess. § 10222 (1989) (135 Cong. Rec. H6131 (daily ed. Sept. 27, 1989)).

The Senate Budget Committee's budget reconciliation bill, which was based in this respect on recommendations by the Senate Finance Committee, omitted any such provision.[1] Instead, that bill would have established a 15-member Commission to study the definition of disability under Title XVI as it applies to determining whether a child under age 18 is eligible to receive benefits. S. 1750, 101st Cong., 1st Sess. § 5001 (Oct. 12, 1989). In particular, the Commission would have considered: (A) "whether individualized functional assessments of children can appropriately be used in determining disability, and if a determination of appropriateness is made, the types of assessment and criteria to be employed"; and (B) recommendations for revisions of the Part B Listing for children, "including the degree to which age-appropriate medical and functional criteria can validly be included in such Childhood Listing of Impairments." *Id.* § 5001(e)(2)(A) and (B). Other provisions of the Senate Committee's bill would have: required pediatricians to participate in disability determinations affecting children (*id.* § 5002(a)), sought to enhance decision-making by mandating that the Social Security Administration (SSA) review at least 50% of all state-agency decisions that a child is not disabled (*id.* § 5002(b)), and required the Secretary to submit to Congress a schedule for the updating and revision of

[1] The Senate Committees thus declined to accept the proposals in the bills introduced by Senator Heinz and Senator Moynihan, cited by respondents (Supp. Br. 2-3).

Part B of the Listing of Impairments for children (*id.* § 5002(c)). See 135 Cong. Rec. S13,205 (daily ed. Oct. 12, 1989). However, all of the SSI children's disability proposals were deleted (along with many other provisions) from the version of the budget reconciliation bill that passed the Senate on October 13, 1989. *Id.* at S13,369 (daily ed. Oct. 13, 1989).[2]

Like the Senate-passed version of H.R. 3299, the budget reconciliation bill reported by the Conference Committee on November 20, 1989, omitted the SSI provisions in the House-passed bill, as well as the Senate Committees' proposals. The bill reported by the Conference Committee was passed by the House of Representatives and the Senate on November 22, 1989. Congress thus declined to adopt the House provision that would have restructured the disability determination process for children.

2. *Administrative Developments.* a. On November 21, 1989, the Secretary of Health and Human Services announced several initiatives concerning the children's disability program (App., *infra*, 1a-2a), in order "to better ensure that needy children with severe disabilities receive the Supplemental Security Income benefits to which they are entitled." *Id.* at 1a. The Secretary explained that "[i]n our efforts to strive for the best possible program administration, we constantly watch how we are managing our programs." *Ibid.* In this con-

[2] In considering the budget reconciliation bill on October 13, 1989, the Senate first adopted Amendment 1004, which deleted the children's disability provisions and all other matter from S. 1750 that did not reduce the deficit. See 135 Cong. Rec. S13,349, S13,357 (daily ed. Oct. 13, 1989). The Senate then substituted the text of S. 1750, as so amended, for the text of H.R. 3299 as it passed the House, and passed this substitute version of H.R. 3299. *Id.* at S13,368-S13,369. The Senate-passed bill is printed in the Congressional Record of October 18, 1989, and shows that Sections 5001 and 5002 of S. 1750, which addressed SSI disability determinations in children, were deleted. 135 Cong. Rec. S13,692, S13,701 (daily ed.).

nection, the Secretary noted that the Social Security Administration (SSA) recently released preliminary findings from a study that reviewed decisions made in childhood disability cases, and that those findings indicated that certain categories of such cases warrant more attention. *Ibid.*; see pages 6-8, *infra*. The Secretary's November 21 statement announces four initiatives in response to these preliminary findings (App., *infra*, 1a-2a):

> (1) all disability claims for children from birth through age three, and claims for older children whose impairments give rise to a greater likelihood of error, will be reviewed twice before they can be denied;
>
> (2) all entities that adjudicate and review children's disability claims will include pediatricians among their medical personnel;
>
> (3) an across-the-board review of the existing medical criteria for all childhood impairments will be undertaken (a process that was begun with the publication of the notice of proposed rulemaking to expand the criteria for evaluating mental impairments in children (54 Fed. Reg. 33,238 (Aug. 14, 1989), discussed in Gov't Reply Br. 4-5);[3] and

[3] This reassessment also is reflected in the new listing for Down Syndrome and other Hereditary, Congenital and Acquired Disorders, which was published in proposed form in October 1987 (52 Fed. Reg. 37,161) and is scheduled for publication in final form in February 1990. Contrary to respondents' contention (Supp. Br. 8), the absence of a specific listing for Down Syndrome and other disorders covered by this proposal at the present time does not mean that otherwise qualified children with those disorders have heretofore been denied benefits. Such children are found eligible if they meet or equal other provisions of the current Listing. For example, children with Down Syndrome typically are evaluated under the listing for mental retardation (§ 112.05), and, depending on associated physical problems, under the growth impairment (§ 100.00), cardiovascular (§ 104.00), or other body system categories. Fox & Greaney, *Disabled Children's Access to Supplemental Security Income and Medicaid Benefits* 48 (Dec. 1988) (lodged with the Clerk by respondents).

> (4) education and training of all disability examiners and medical personnel will be intensified to ensure complete understanding of the requirements for adjudicating children's disability claims.

b. The preliminary findings to which the Secretary referred in announcing his initiatives on November 21 are those contained in the report prepared by SSA for the staff of the Senate Finance Committee in connection with its consideration of the pending legislation, discussed above. See SSA, Office of Disability, *Preliminary Staff Report: Childhood Disability Study* (Sept. 20, 1989) [hereinafter *Preliminary Report*]. We lodged a copy of the *Preliminary Report* with the Clerk of this Court when we filed our reply brief at the merits stage, and it is mentioned in our reply brief (at 19 & nn. 15, 16) and discussed in respondents' supplemental brief (at 9-14), which we received in typescript on November 13, 1989, and in printed form on November 17, 1989.

The study on which the *Preliminary Report* was based reviewed 927 children's disability cases decided by state agencies in which benefits were denied, in order to determine whether cases are being correctly decided under the existing Listing and to determine whether the criteria in the Listing adequately identify disabled children who meet the general level of impairment severity articulated in the Act and regulations. *Id.* Tab C, at 1. The *Preliminary Report* found that in the entire sample of 927 surveyed cases, the overall rate of erroneous denials under existing standards was approximately 6.4% (*id.* Tab D, Table 2), which HHS informs us does not differ significantly from the range of error that is experienced under the disability programs generally.[4] How-

[4] Of course, individuals whose claims were denied at the initial determination stage on the basis of the state agency's finding may seek reconsideration of that denial and then may also seek an ALJ hearing and Appeals Council review to correct any error in the preliminary stages of the review process. We have been informed

ever, the *Preliminary Report* did identify several categories of impairments for which the error rate may be considerably higher.[5] The tentative error rate of 41.9% for growth impairments was of particular concern (*id.* Tab A, at 2; Tab D, Table 3), as was the error rate of 10.4% for mental impairments (*id.* Tab D, Table 3), since approximately 60% of all childhood disability claims involve allegations of a mental impairment (*id.*, Tab E, at 1). The *Preliminary Report* concluded that the initial review of the study findings "provides no indication that there are any overall or generalized problems with the childhood disability evaluation criteria," but that "the criteria for several specific impairments may need to be reevaluated and revised" and that "certain impairment categories may be more prone to adjudicator error." *Id.* Tab F, at 1.

The initiatives announced by the Secretary on November 21 respond to these findings and are based on similar recommendations in Tab F of the *Preliminary Report.* Those initiatives demonstrate the Secretary's determination to ensure that the children's disability program is

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by HHS that cases in which the claimant sought further review and was found disabled at later stages of the review process were excluded from the sample.

[5] The small sample size for several categories renders the percentage rate subject to a very high margin of error. *Preliminary Report* Tab C; *id.* Tab D, Table 2 (note). For example, we have been informed by HHS that, because of the small sample size for cardiovascular claims, the rate of erroneous denials of 28.6% (*id.* Tab D, Table 2) is itself subject to a sampling error of ±25%. The *Preliminary Report* also urges caution in the use of the raw data because the cases were not drawn entirely at random. The study was designed to ensure that cases would be drawn from four age groupings and specific impairment categories, and the percentages in the *Preliminary Report* have not yet been weighted to compensate for this sampling methodology. *Id.* Tab C; *id.* Tab D, Table 2 (note). We have been informed by HHS that the data will be weighted and refined in the final report based on the study, which is due to be issued early in 1990.

administered in a fair and sound manner and to review and, where appropriate, revise the criteria in the Listing of Impairments in light of experience. By the same token, the Secretary's actions address several matters (review of certain denials to ensure proper application of standards, use of pediatricians, and review of the children's listings) that were the subject of the legislative proposals that Congress deleted from the budget reconciliation bill. These measures underscore that modifications of the children's disability program are properly committed to the Secretary and Congress, not the courts.

c. The discussion in respondents' supplemental brief (at 9-14) of the *Preliminary Report* that underlies the Secretary's recent actions is misleading in two important respects. First, respondents argue (Supp. Br. 10) that the *Preliminary Report* is inconsistent with Social Security Ruling (SSR) 83-19, which, in their view (Supp. Br. 5-6, 10), altogether prohibits consideration of the functional impact of an impairment (or combination of impairments) in determining whether it equals the Listing. However, as we have explained in our reply brief (at 15 n.10), SSR 83-19 does not bar consideration of impairment-related functional limitations in determining whether an impairment is of sufficient severity to equal a listed impairment. The passages in SSR 83-19 upon which respondents rely (J.A. 239-240) merely stress that an equivalency determination is not to be made on the basis of an assessment of residual functional capacity (RFC), as respondents urge, or solely on the basis of an overall assessment of functional impact that is not tied closely to the criteria in the Listing.

The *Preliminary Report* in fact confirms that SSR 83-19 does not rule out consideration of impairment-related functional limitations in making an equivalency determination, because it states that the errors identified in cases in the study sample that should have been found to equal the mental impairment listing were "almost exclusively based on the failure to consider how all docu-

mented impairments combined to affect a child's overall functional capacity." *Id.* Tab E, at 2.[6] As respondents concede (Supp. Br. 10), the Secretary also made clear at the outset of the SSI program that impairment-related functional limitations could be taken into account in appropriate circumstances in making an equivalency determination. J.A. 97. The Secretary's position on this issue therefore has been consistent throughout. In attempting to paint a picture of administrative inconsistency in this regard, respondents construe SSR 83-19 in a manner that is contrary not only to the Secretary's interpretation of his own administrative ruling (compare *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965)), but also to their own interests, which presumably are served by a policy that takes impairment-related functional limita-

[6] This same understanding is set forth in the training manual for physicians who review claims under the disability programs. SSA, Office of Disability, *Physician Training Manual on Impairment Evaluation* (June 1988). The introduction to that *Manual* states (at 10):

> Medical equivalency permits a physician to arrive at a judgment that the findings, although not exactly matching the listed criteria, have the same effect as a listed impairment with regard to inability to perform work-related activities for at least 12 months or result in death. In addition, individuals may have more than one impairment or a combination of impairments, none of which alone matches in its clinical presentation, the criteria that are listed, but *together*, the findings as presented have the same impact on inability to perform gainful activity for at least 12 months or result in death as the findings provided in a listed impairment. Under these circumstances, the physician may arrive at a judgment of "equals the listings." Caution should be used in arriving at equals decisions to avoid misuse in inadequately documented cases and in cases of lesser than listing severity. Great care must be taken to provide a thorough and complete rationale for this decision.

This passage discusses equivalency determinations for adults, but the point that impairment-related functional limitaitons may be taken into account in an equivalency determination would apply equally to children. We have lodged a copy of the *Physician Training Manual* with the Clerk of this Court.

tions into account in an equivalency determination in appropriate circumstances.

Second, respondents erroneously assert (Supp. Br. 9-10, 11-13) that the *Preliminary Report* actually supports the notion that the Act requires an individualized assessment of a child's RFC and non-medical factors similar to an adult's vocational factors of age, education and work experience. They rest this assertion on the fact that the *Preliminary Report* discusses the importance of collecting data on a child's activities of daily living (*id.* Tab A, at 2; Tab B, at 2)[7] and acknowledges that the impact of an impairment on age-appropriate activities warrants particularized consideration under the Listing in appropriate circumstances, especially in the case of mental impairments (*id.* Tab E, at 1-3; *id.* Tab F, at 1). What respondents ignore is that, as the *Preliminary Report* makes clear, the regulatory framework that has been in place for more than 15 years provides for consideration of activities of daily living and impairment-related functional limitations, where appropriate, for purposes of measuring the severity of the impairment itself—*i.e.*, in determining whether the individual's impairment meets or equals the Listing. That is something quite different from the approach respondents propose, which would cut the disability determination loose from the objective measures of impairment severity in the Listing and instead require an RFC/non-medical-factors assessment of children—albeit without the benefit of an objective benchmark (parallel to an adult's ability to work) against which to make such an assessment.

[7] The current application form to be completed by or on behalf of individuals seeking children's disability benefits requests information about the applicant's activities of daily living. Form SSA-3820-F6, question 13, included in *Preliminary Report* Tab B. SSA is considering the promulgation of a uniform nationwide form that solicits more detailed information in this area. *Preliminary Report* Tab B, at 2.

For the foregoing reasons and those set forth in our opening and reply briefs, it is respectfully submitted that the judgment of the court of appeals should be reversed.

KENNETH W. STARR
Solicitor General

NOVEMBER 1989

APPENDIX

HHS NEWS

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES

FOR IMMEDIATE RELEASE
Tuesday, November 21, 1989

Phil Gambino
(202) 245-6764
Frank Battistelli
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HHS Secretary Louis W. Sullivan, M.D. issued the following statement today:

"As Americans we all take great pride in the protection we can provide to the vulnerable children of this great country. We in the Department of Health and Human Services provide much of this protection and support for families with disabled children through the Supplemental Security Income program administered by SSA.

"Today I am taking actions to better ensure that needy children with severe disabilities receive the Supplemental Security Income benefits to which they are entitled. I want to be personally assured that all needy children entitled to disability benefits receive them and the critical medical coverage that often accompanies receipt of SSI through eligibility to the Medicaid program.

"In our efforts to strive for the best possible program administration, we constantly watch how we are managing our programs. The Social Security Administration has recently released preliminary findings from a study looking at decisions made in childhood disability cases. Findings include the fact that certain children's case categories warrant more attention.

- "Today I am directing that all claims for disabled children from birth through age three be reviewed

twice before a claim is denied. Likewise, claims involving older children with impairments which have been found to have greater likelihood of error will also receive a double review.

- "I am directing all entities that adjudicate and review SSA childhood claims to include pediatricians among their medical personnel. All the medical personnel involved in the disability program are familiar with adjudicating childhood claims. Even so, pediatricians are specialists in those factors concerned with the growth and development of children. Likewise other specialists will continue to be involved in appropriate childhood claims.

- "I am directing an across-the-board review of the medical criteria for all childhood impairments. This process was recently begun with the publication of a notice of proposed rulemaking to expand the criteria for evaluating mental impairments in children. I have asked the Commissioner of Social Security to ensure that all of the medical listings applicable to children be reviewed and revised as soon as practical.

- "I am directing that a special effort be given to intensifying the education and training of all disability examiners and medical personnel to ensure a complete understanding of the requirements for adjudicating childhood claims in the disability program. Because 1 in 15 claims is filed on behalf of a child, greater emphasis is needed to assess the unique issues in deciding childhood claims."

☆ U. S. GOVERNMENT PRINTING OFFICE, 1988 882203 822